# STATE OF MICHIGAN

# COURT OF APPEALS

JENNIFER MOOREHEAD,

Plaintiff-Appellant,

v

COMERICA, INC.,

Defendant-Appellee.

UNPUBLISHED
October 31, 2000

No. 203675
Wayne Circuit Court
LC No. 95-532170 CL

Before: Cavanagh, P.J., and White and Talbot, JJ.

WHITE, J. (*concurring in part and dissenting in part*).

I agree that plaintiff's wrongful termination claim was properly dismissed. I respectfully dissent from the analysis of plaintiff's failure to accommodate claim and the determination that it was properly dismissed.

"The purpose of the [PWDCRA] is to mandate 'the employment of the handicapped to the fullest extent reasonably possible.'" *Chmielewski v Xermac, Inc*, 457 Mich 593, 601; 580 NW2d 817 (1998). The act is remedial and is to be liberally construed by the courts. *Id.* The PWDCRA and ADA have similar purposes and share some definitions. Michigan courts have thus looked to ADA cases for guidance. *Stevens v Inland Waters, Inc*, 220 Mich App 212, 216-217; 559 NW2d 61 (1996). Several United States Circuit Courts of Appeals interpreting the ADA have held, based on the federal regulations to implement the equal employment provisions of the ADA, 29 CFR § 1630.2(o)(3),[1] that an employee's request for accommodation triggers the "employer's obligation to participate in the interactive process of determining one." *See Richards v American Axle & Manuf'g, Inc*, 84 F Supp 2d 862, 872 (ED MI, 2000), quoting *Taylor v Principal Financial Group, Inc*, 93 F3d 155, 165 (CA 5, 1996); *Hendricks-Robinson v Excel Corp*, 154 F3d 685, 693 (CA 7, 1998) (once an employee informs employer of disability, the employer must engage in a "flexible, interactive process . . . so that, together, they might

[1] 29 CFR § 1630.2(o) addresses what constitutes "reasonable accommodation," and states in pertinent part: "to determine the appropriate reasonable accommodation it may be necessary for the covered entity [employer] to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation."

identify the employee's precise limitations and discuss accommodations which might enable the employee to continue working."); see also *Criado v IBM Corp*, 145 F3d 437, 444, 445 (CA 1, 1998), and *Cehrs v Northeast Ohio Alzheimer's Research Ctr*, 155 F3d 775, 783-784 (CA 6, 1998) (both cases noting that "an employee's request for reasonable accommodation requires a great deal of communication between the employee and employer[;] . . . both parties bear responsibility for determining what accommodation is necessary," quoting *Bultemeyer v Fort Wayne Comm Schools*, 100 F3d 1281, 1285 (CA 7, 1996), and that the duty to provide reasonable accommodation is "a continuing one," quoting *Ralph v Lucent Techs*, 135 F3d 166, 172 [CA 1, 1998]). A recent case from the United States Court of Appeals for the Seventh Circuit, *Rehling v Chicago*, 207 F3d 1009 (CA 7, 2000), noted that "a plaintiff cannot base a reasonable accommodation claim *solely* on the allegation that the employer failed to engage in an interactive process," further stating that "[t]he ADA seeks to ensure that qualified individuals are accommodated in the workplace, not to punish employers who, despite their failure to engage in an interactive process, have made reasonable accommodations." *Id.* at 1016.

The PWDCRA provided at pertinent times that except as otherwise provided in the act, "a person shall accommodate a handicapper for purposes of employment . . . unless the person demonstrates that the accommodation would impose an undue hardship." MCL 37.1102(2); MSA 3.550(102)(2). "In an action . . . for a failure to accommodate, the handicapper shall bear the burden of proof. If the handicapper proves a prima facie case, the person shall bear the burden of producing evidence that an accommodation would impose an undue hardship on that person. MCL 37.1210(1); MSA 3.550(210)(1). The act provides that a failure to accommodate violation may be alleged only if the handicapper "notifies the person in writing of the need for accommodation within 182 days after the date the handicapper knew or reasonably should have known that an accommodation was needed." MCL 37.1210(18); MSA 3.550(210)(18); see e.g., *Sanchez v Lagoudakis*, 458 Mich 704, 724 n 25; 581 NW2d 257 (1998).

Plaintiff did not specifically request, in writing or otherwise, that defendant apply her accrued vacation or personal leave time to delay or prevent her being administratively terminated. However, plaintiff's letter to defendant dated March 28, 1995, quoted in the majority opinion, clearly and expressly requested reinstatement, and I conclude that that letter satisfies the act's requirement that an employee request accommodation. See e.g., *Hendricks-Robinson*, *supra* at 694 (noting that a request as straightforward as asking for continued employment is a sufficient request for accommodation); and *Miller v Illinois Corrections Dep't*, 107 F3d 483, 487 (CA 7, 1997) (noting that employee's statement that "I want to keep working for you—do you have any suggestions?" triggered employer's obligation to determine whether it had a job employee may be able to fill).

It is undisputed that plaintiff's administrative termination took effect on a Sunday (March 19, 1995). The record is clear that on Monday, March 20, 1995, the day after defendant administratively terminated plaintiff, plaintiff notified defendant that she had a return-to-work letter from Dr. Ramakrishna certifying she was able to return to work on March 21, 1995. On March 21, she went to the bank, attempted to discuss the matter with Allison, and presented Allison with her return to work medical certification.

In *Bultemeyer, supra* at 1286, the court held that the employer should have reconsidered its decision to terminate the plaintiff's employment when, within a few hours of having terminated the employee, the defendant received a letter from the plaintiff's physician requesting additional medical leave. The court noted:

> FWCS [the employer] maintains that Bultemeyer never asked for a reasonable accommodation and that the letter from Dr. Fawver was an instance of "too little, too late." The trial court also saw the situation this way, going so far as to suggest that Bultemeyer asked Dr. Fawver to "make up" the recommendation for a less stressful work environment, in an attempt to justify his failure to report for work. In this way, the trial court is examining the facts in the light *least* favorable to Bultemeyer, the non-moving party, where instead it should be viewing them in the light *most* favorable to him. . . .
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> *FWCS claims that the note from Dr. Fawver came too late for it to respond, because FWCS did not receive the note until after it had fired Bultemeyer. However, FWCS received the note the very same day (not two days later as the trial court mistakenly found). A few hours' tardiness should not be the reason for cutting off the interactive process and cutting off a person's rights under the ADA. This was not a lengthy, inexcusable delay. . . . Even though the letter came after FWCS decided to fire him, FWCS could have used the opportunity it presented to reconsider the decision to terminate his employment and include Bultemeyer and Dr. Fawver in the discussions. That would have been a proper way to engage in the interactive process. Instead, FWCS "fail[ed] to communicate, by way of initiation or response," and the interactive process broke down. . . .* [Emphasis added.]

Defendant argues that it does not and could not use plaintiff's accrued vacation days to extend plaintiff's medical leave. However, plaintiff was not seeking to extend her medical leave of absence, rather, she sought to have defendant accept, based on Dr. Ramakrishna's letter, that she could work at the time she was administratively terminated. Under the circumstances presented, I conclude that a question of fact remained whether defendant failed to accommodate plaintiff. See *Bultemeyer,* and cases cited above, *supra.*

The majority concludes that the accommodation claim is not properly before us based on plaintiff's deposition testimony and certain statements of plaintiff's counsel below. I disagree. Although plaintiff's counsel represented at plaintiff's deposition that accommodation was not an issue, it is clear from the context that the intended reference was to an accommodation to facilitate plaintiff's performance of her job functions, i.e., plaintiff was claiming she could do her job and that she needed no accommodation in order to perform that job. Plaintiff's response brief below stated that she was not arguing that she was entitled to further time in which to return, (because she was able to return), but that case law and the ADA regulations support that permitting the use of accrued vacation time is a reasonable accommodation. I note that on appeal both parties discuss and argue the *Cehrs* case, see *infra*. Although admittedly not labeled as an accommodation claim, the issue whether defendant adequately responded to plaintiff's request for reinstatement was raised and litigated before the circuit court and argued to this Court as well.

The excerpt of plaintiff's deposition the majority quotes to support its waiver argument is from her July 24, 1996 deposition. Defendant's motion for summary disposition, filed subsequently, on November 18, 1996, argued in pertinent part:

> F. REEMPLOYMENT AFTER TERMINATION
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> As with all other employees on paid medical leave of absence who were still certified disabled from working by their doctors on the last day of the qualifying period, such employees could apply for LTD. If they were able to work, then they were to reapply in order to restore or reinstate their salary and benefits if a position were available.
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> Plaintiff never sought to reapply for employment through such channels.

The majority omits from its factual summary that plaintiff argued in her response brief to defendant's motion for summary disposition, and provided an affidavit to support that, as of March 19, 1995 she had accrued four weeks of vacation time and three days of personal leave time, and that allowing her to use accrued vacation or personal leave time, rather than terminating her, **would have been a reasonable accommodation**, citing various cases applying the Americans with Disabilities Act (ADA), 42 USC § 12101 *et seq.* Plaintiff's response brief, dated December 6, 1996, stated:

> Ms. Moorehead wrote an impassioned letter requesting reinstatement. (Exhibit 9) She did not receive a response to her correspondence. She contacted an attorney in order to aid her in seeking reinstatement to her former position with defendant. Between May of 1995, and October 31, 1995, counsel communicated with Beth Mier and Catherine Wenger, of the Comerica Legal Department, telling each that plaintiff wanted to be reinstated. (Goldberg Pitt Aff, ¶ 2, 3) A response pertaining to the feasibility of reinstatement was never received. A lawsuit was not filed until approximately 7 months after plaintiff first informed defendant that she desired a return to her former position and received no response from defendant to her requests. Ms. Moorehead has never relinquished her desire to be reinstated.

Defendant's reply brief to plaintiff's response to the motion for summary disposition argued:

> F. **POTENTIAL REEMPLOYMENT**
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> Plaintiff further goes to great lengths to argue that she made an "impassioned" plea to be reinstated to her former position with an affidavit from her attorney. Plaintiff's efforts, however, were minimal. Pursuant to the Bank's policy, employees who have been administratively terminated are eligible to apply for any open position for which they are qualified and interested in after their disability

> has subsided sufficiently to allow their return to work. It is the practice of Cathrine Wenger, the Bank's in-house counsel, to inform plaintiffs' counsels of this policy if they inquire about the possible reinstatement of their clients [Wenger Aff., attached as Ex G].
>
> Plaintiff, however, never availed herself of this opportunity . . . .

I note that Wenger's affidavit stated that she did "not specifically recall advising Ms. Pitt [plaintiff's counsel] that her client should submit an application for re-employment," although it was her "common practice" to do so.

Defendant's appellate brief again affirmatively argues that plaintiff failed to invoke its established, internal reemployment process after termination:

> [I] F. **PLAINTIFF'S FAILURE TO USE REEMPLOYMENT PROCESS AFTER TERMINATION AND SELF-REMOVAL FROM WORK FORCE**
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> * * *
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> Plaintiff never sought to reapply for employment . . . Instead, she submitted a letter demanding to be reinstated to her former job . . . .
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> * * *
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> [II.A(2)]
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> . . . . plaintiff points out that the court in Cehrs, "placed heavy emphasis on the employer's 'opportunity to reconsider its adverse employment action when Cehrs . . . reapplied for a position shortly after she was terminated.' Again, this factor does not apply in plaintiff's case because plaintiff did not reapply for a position, even though she was welcome to have done so. . . .

Under these circumstances, I disagree with the majority's conclusion that plaintiff "unequivocally waived any accommodation claim at her deposition and did not otherwise argue it in the lower court." Defendant affirmatively argued below, and continues to maintain on appeal, that plaintiff failed to avail herself of defendant's established reemployment process. The record is clear that shortly after defendant administratively terminated plaintiff, plaintiff wrote defendant a letter requesting reinstatement. This issue was briefed and argued below. The record is clear that defendant at no point responded to plaintiff's request to return to work, and nowhere argued that plaintiff's request to return to work was unreasonable or that reemployment would constitute an undue hardship. Plaintiff's letter to defendant dated March 28, 1995 met the PWDCRA's 182-day written notice requirement, MCL 37.1210(18); MSA 3.550(210)(18). Under these circumstances, summary disposition was improperly granted.

I would vacate the dismissal of plaintiff's failure to accommodate claim.

/s/Helene N. White